No. 939

In the Supreme Court of the United States

OCTOBER TERM, 1941

OVERNIGHT MOTOR TRANSPORTATION COMPANY, INC.,
PETITIONER,

v.

WILLIAM H. MISSEL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF ON BEHALF OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

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BRIEF ON BEHALF OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

The Solicitor General submits this brief on behalf of the Administrator of the Wage and Hour Division, Department of Labor, as *amicus curiae*.

OPINIONS BELOW

The opinion of the district court overruling petitioner's motion to dismiss the complaint is reported at 36 F. Supp. 980 (R. 5–15). The opinion of the district court granting judgment for petitioner on the merits is reported at 40 F. Supp. 174 (R. 27–44). The opinion of the Circuit Court of Appeals

for the Fourth Circuit, reversing the decision of the district court, is not yet reported (R. 56–78).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 5, 1942 (R. 78). The petition for writ of certiorari was granted by this Court on February 16, 1942 (R. 80). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. The respondent was employed by the petitioner at a fixed weekly salary. Section 7 of the Fair Labor Standards Act requires additional compensation for overtime "at a rate not less than one and one-half times the regular rate" of compensation. May the employer avoid paying additional compensation for overtime merely because the fixed weekly salary is in excess of the minimum wage for full time plus one and one-half times the minimum rate for overtime?

2. Whether Section 16 (b), making any employer who violates the minimum wage or overtime compensation provisions of the Act liable to the employee affected in the amount of the unpaid statutory compensation and "in an additional equal amount as liquidated damages," violates the Fifth Amendment as applied to petitioner in the circumstances of this case.

3. Whether, pursuant to Section 13 (b) (1) of the Fair Labor Standards Act, respondent, a rate clerk employed by a motor carrier, was exempt from Section 7 until a formal determination had been made by the Interstate Commerce Commission that rate clerks were not engaged in activities concerning the safety of operation and were therefore subject to the provisions of the Fair Labor Standards Act rather than to the jurisdiction of the Interstate Commerce Commission in respect to the regulation of hours of labor.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act and of the Motor Carrier Act, 1935, appear in the Appendix, *infra*, pages 24–26.

STATEMENT

Respondent instituted this suit under Section 16 (b) of the Fair Labor Standards Act to recover unpaid overtime compensation allegedly required by Section 7. The pertinent facts are stipulated (R. 17–18). Respondent was employed by petitioner, a common carrier of freight by motor truck, in the capacity of rate clerk and office employee from November 26, 1937, to October 19, 1940, and in the discharge of his duties he was engaged "in commerce" (R. 17–18). Until October 31, 1938, respondent received $25.50 a week and thereafter $27.50. He worked a varying number of hours

from week to week, including, during the period after the Act became effective, at least two work-weeks of 80 hours and at least three other work-weeks of 75 hours (R. 18).

Petitioner's motion to dismiss the complaint, on the ground that Section 7 could not apply to respondent prior to a determination by the Interstate Commerce Commission that his hours of work could not be regulated under the Motor Carrier Act, was denied by the District Court (R. 5–15). Thereafter the court found that, since the employee's weekly compensation was at least equal to the statutory minimum rate for the statutory work-week plus one and one-half times that rate for the overtime hours, there was no violation of Section 7 and entered judgment for the employer (R. 27–44). The Circuit Court of Appeals reversed (R. 78–79), holding that the employee was entitled to additional compensation for his overtime hours at one and one-half times his regular rate of pay and that the regular rate was determined for each week by dividing the weekly salary by the number of hours worked.

SUMMARY OF ARGUMENT

1. Petitioner employed respondent at a fixed weekly wage and contends that it need not pay any additional compensation for overtime under Section 7 of the Fair Labor Standards Act, since the weekly wage exceeded the statutory minimum wage for full time plus one and one-half times the

minimum rate for overtime. That petitioner has misconceived the scope of Section 7 is shown by the Administrator's brief in *Walling* v. *A. H. Belo Corp.*, No. 622, to be argued immediately preceding this case. Indeed, the result there urged by the Administrator follows *a fortiori* in this case since the employer had not here taken the further step of attempting to establish new "rates" by contract in an effort to circumvent the statute.

2. Since the employee was awarded not only overtime compensation but also "an additional equal amount as liquidated damages" under Section 16 (b), the petitioner contends that it was denied due process. Its contention is based upon the fact that Section 13 (b) (1) exempts employees who are subject to the maximum hours provisions of the Motor Carrier Act, 1935, and that the wages involved herein relate to a period of employment prior to the final determination of the Interstate Commerce Commission that this employee was not subject to those provisions of the Motor Carrier Act.

Although petitioner, through its trade association, chose to contest the question of the applicability of the Motor Carrier Act, the position of the Commission and the ultimate result were plainly forecast before the period for which recovery was allowed herein. Even if the result were less clear, the provision for double damages is valid as applied during the period in which the applica-

tion of the statute was being contested. Section 16 (b) was patterned after the treble damage provision of the Sherman Act, and it has never been supposed that those provisions violated due process when applied to a defendant who in good faith contested the application of the Sherman Act to his particular business arrangement. Moreover, the constitutional question is foreclosed by *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U. S. 57, 68–69, and even if the double damage provisions were penal rather than compensatory in character, they would nevertheless be valid. Cf. *Missouri Pacific Ry. Co.* v. *Tucker*, 230 U. S. 340, 348.

3. Nor is there any foundation for petitioner's related contention that Section 7 itself did not become operative with respect to respondent until after the Interstate Commerce Commission had made a final determination of the employee's status. Subsection (d) of Section 7 itself expressly states that "This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act." No exception is spelled out for employees whose status might be uncertain by reason of Section 13 (b) (1), and none can be inferred. Indeed, if the application of Section 7 were suspended until the Interstate Commerce Commission had acted with respect to each employee or each type of employee, certain employees might be permanently denied the benefits of Section 7 by default on part of the Commission,

since there is nothing in the Fair Labor Standards Act to require the Commission to assume jurisdiction in this situation.

I

THE COURT BELOW PROPERLY CONSTRUED THE "REGULAR RATE" WITHIN THE MEANING OF SECTION 7 (a)

Petitioner contends that the overtime compensation provisions of Section 7 do not apply at all where the employee's total weekly compensation equals at least the statutory minimum wage established by Section 6 for straight time and time and one-half that minimum for the overtime hours. This contention is based upon the view that Congress intended "through Section 7 to establish minimum overtime wages for the same class of employees covered by Section 6" (Br. 9); petitioner insists that the Act is confined in purpose to the regulation of wages and is not concerned with the regulation of hours.[1]

In the brief filed on behalf of the Administrator in *Walling* v. *A. H. Belo Corp.*, No. 622, to be argued immediately preceding the present case, the purposes and meaning of Section 7 are fully dis-

[1] In support of this construction, petitioner urges that a contrary interpretation "raises serious doubts as to the constitutionality" of Section 7 (Br. 12, 20). The validity of Section 7 as a conditional regulation of hours raises no constitutional question not heretofore settled by decisions of this Court. *United States* v. *Darby*, 312 U. S. 100, 125, and cases there cited.

cussed and it is demonstrated that Congress sought to regulate hours as well as wages (pp. 14–30). Petitioner's own incomplete review of the legislative history (Br. 16–19), far from showing anything to the contrary, strengthens that conclusion. The court below, in approving the consistent [2] administrative interpretation of Section 7, exhaustively reviewed the pertinent authorities (R. 56–78).

The facts herein differ from those presented in the *Belo* case in that there was no attempt here by contract to set the "regular rate" at some figure other than the actual rate of compensation. The case is therefore one of that category (see *Belo* brief, note 48, pp. 39–40) in which the employee's

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[2] Petitioner relies (Br. 27) upon an informal remark made by former Administrator Andrews at an open forum discussion to show an inconsistency in administrative interpretation. That remark was not free from ambiguity and should be considered in the light of the fact that on October 21, 1938, before the Act became effective, Mr. Andrews released Interpretative Bulletin No. 4, containing the considered opinion of the Administrator and his General Counsel that "regular rate" means the employees' actual hourly rate and not the statutory minimum. There has been no deviation from this interpretation. (*Belo* brief, pp. 19–20.) The opinion of an Assistant Solicitor of the Wage and Hour Division, referred to by petitioner (Br. 28), is in no way inconsistent with the Administrator's view. The portion quoted by petitioner merely explains the method of determining the regular rate of pay where an employee is employed *at a fixed weekly salary for a fixed number of hours.* In such cases, of course, the contract in effect sets a specific and unvarying hourly rate, and the courts have so held. (*Belo* brief, note 13, p. 16.)

compensation can be deemed to be in compliance with the Act only if the Court will infer an agreement distributing the weekly salary between straight-time and overtime in such proportions that the rate for overtime hours will be one and one-half times the rate for straight time hours. To indulge in such arithmetical manipulation by inference would result in a distortion of the employment contract. And it would approach absurdity where, as here, the contract of employment was made before the Act became effective, and where, since respondent worked a varying number of hours for a fixed salary, there would have to be an implied automatic adjustment of the employment contract each week.

II

THE AWARD OF "DOUBLE DAMAGES" WAS CONSISTENT WITH DUE PROCESS OF LAW

Petitioner contends that the award of double damages constituted a denial of due process in the circumstances of this case. These additional damages were mandatory[3] under the statute since Section 16 (b) (*infra*, pp. 24–25), which authorizes an employee to maintain suit for recovery of his unpaid minimum wages or unpaid overtime compensation, provides that the employer shall be liable for "an additional equal amount as liquidated damages."

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[3] See the cases collected in the opinion of the court below, R. 77–78.

In substance, petitioner contends that the award of double damages here is inconsistent with due process since the violations occurred during a period when it could not be certain that respondent's employment was governed by Section 7. The alleged uncertainty stemmed from Section 13 (b) (1) (*infra*, p. 24), which excepts from Section 7 "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935 * * *." Petitioner claims that prior to a specific finding by the Commission that rate clerks were not within the scope of Section 204, petitioner was "in a twilight zone relative to jurisdiction under the two Acts" and could in no way "anticipate the ultimate determination" (Br. 49, 57). Since a specific determination was not made by the Commission until March 4, 1941,[4] and since respondent's employment ended prior to that date, petitioner contends that coverage was uncertain during the entire period for which recovery, including "double damages," was allowed.

1. But some ten months prior to October 24, 1938, the effective date of Section 7, and therefore prior

[4] *Ex parte* MC–2 and MC–3, 28 M. C. C. 125. The Commission held that all employees of common, contract, and private carriers other than drivers, mechanics, loaders, and drivers' helpers, performed duties which did not affect the safety of operation of motor vehicles and were not, therefore, subject to the Commission's power under Section 204.

to the accrual of any liability herein, it was exceedingly clear that, so far as the Commission was concerned, employees such as respondent were not subject to Section 204. On December 29, 1937, the Commission fixed a maximum workweek for drivers and specifically held that "until the Congress shall have given us a more particular and definite command in the premises, we shall limit our regulations concerning maximum hours of service to those employees whose functions in the operation of motor vehicles make such regulations desirable because of safety considerations."[5] On March 25, 1939, the Administrator of the Wage and Hour Division advised employers that Section 13 (b) (1) of the Fair Labor Standards Act exempted only those employees of common and contract motor carriers whose duties affected safety of operation.[6] On May 9, 1939, and June 15, 1939, the Commission reaffirmed its prior ruling concerning the scope of Section 204.[7] Thus the Commission had "three times concluded that its authority was limited to securing safety of operation." *United States* v. *American Trucking Ass'ns*, 310 U. S. 534, 549. However, in its decision of May 9, 1939, the Commission left open the question whether any employees other than drivers came within the announced

[5] *Ex parte* MC–2, 3 M. C. C. 665, 667.

[6] Interpretative Bulletin No. 9. The nature of these bulletins is discussed in the *Belo* brief, note 17, p. 19.

[7] *Ex parte* No. MC–28, 13 M. C. 481, 488; No. MC–C–139, 16 M. C. C. 497.

limits of regulation;[8] it is this circumstance which affords the entire ground for petitioner's assertion that prior to March 4, 1941, it had no means of determining whether respondent was an employee whose activities affected safety of operation.

It was at all times clear that respondent did not come within the statutory test laid down by the Commission. He was a rate clerk engaged in applying proper tariffs to various classifications of freight, collecting and accounting for freight revenues, disbursing expense money to employees, and "dispatching" trucks when the chief dispatcher was absent from duty (R. 17–18).[9] Clerical duties

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[8] 13 M. C. 481, 488.

[9] The District Court found that respondent's "duties are clerical and have no direct relation to operation, other than through the tenuous argument that since motor vehicles cannot lawfully transport goods in interstate commerce until the rates or charges for so doing have been duly established and exacted, the rate clerk, therefore, performs duties relating to operation, because there can be no operation without rates" (R. 12). Without taking issue with the proposition that it was at all times obvious that a rate clerk's duties did not affect safety of operations, petitioner emphasizes the fact that one of respondent's duties was "the dispatching of trucks" (Br. 47). The record does not indicate what this function consisted of, and respondent's elaboration of the duties, outside the record (*ibid.*), establishes at most an indirect and weak relation to safety of operation. In its decision of March 4, 1941, *supra*, the Commission pointed out that "The average carrier operating a small number of vehicles has the dispatching done as an incident to other work. It may be done by the owner, by a driver, or by a clerk. * * * errors of judgment (on the part of dispatchers) are not the proximate causes of such accidents, and * * *

of this kind could not possibly affect the safety of operation and petitioner may not contend with any justification that until the Commission's decision of March 4, 1941, the applicability of Section 7 was in substantial doubt.

2. Respondent is on no firmer ground in seeking to avoid "double damages" during the more limited period terminating May 27, 1940, when this Court rejected, in litigation conducted by petitioner's trade association, the contention that under Section 204 the Commission was required to prescribe maximum hours of employment for all employees of common and contract motor carriers. *United States* v. *American Trucking Ass'ns,* 310 U. S. 534. Petitioner, of course, had the right to challenge in the courts the validity of the statutory construction enunciated by the two administrative agencies concerned. But such right of review plainly did not include a concomitant power to avoid, during exercise of the right, a remedial provision designed to compensate those who suffered by reason of petitioner's continued violations.

Section 16 (b) of the Fair Labor Standards Act is modelled after Section 7 of the Sherman Act (Act of July 7, 1890, c. 647, 26 Stat. 209, 210),

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the dispatchers engage in no activities which directly affect the safety of operation * * *." 28 M. C. C. 125, at 135. In any event, it is apparent from the stipulation that respondent "dispatched" trucks only in the absence of the chief dispatcher and that respondent's principal duties were entirely clerical in nature (R. 17–18).

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which provides that any person injured in his business by the proscribed practices may bring suit in the federal district court "and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee." Under this provision the plaintiff "is given a remedy for his losses in treble damages." *United States* v. *Cooper Corp.*, 312 U. S. 600, 608. The legislative intent, plainly, is to award some measure of compensation other than provable damages to victims of transgressions against announced social policy. Cf. *Chattanooga Foundry* v. *Atlanta*, 203 U. S. 390, 396–397.[10] And it has never been supposed, through years of extensive interpretation, that the treble damages provision vio-

[10] The lower Federal courts have recognized the compensatory, rather than penal, character of Section 7 of the Sherman Act in cases involving an inquiry into the applicable statute of limitations (*City of Atlanta* v. *Chattanooga Foundry*, 101 Fed. 900 (C. C. E. D. Tenn., reversed on other grounds, 127 Fed. 23 (C. C. A. 6th), affirmed, 203 U. S. 390; *Hansen Packing Co.* v. *Swift & Co.*, 27 F. Supp. 364, 367 S. D. N. Y.); *Jones & Co.* v. *West Publishing Co.*, 270 Fed. 563, 566 (C. C. A. 5th); *Shelton Electric Co.* v. *Victor Talking Mach. Co.*, 277 Fed. 433 (N. J.)) and in cases involving the question whether the right to sue under Section 7 survives death (*Sullivan v. Associated Billposters, etc.*, 6 F. (2d) 1000, 1009 C. C. A. 2d); *Imperial Film Exch.* v. *General Film Co.*, 244 Fed. 985 (S. D. N. Y.); *Moore* v. *Backus*, 78 F. (2d) 571 (C. C. A. 7th); *Baush Machine Tool Co.* v. *Aluminum Co.*, 63 F. (2d) 778 (C. C. A. 2d), certiorari denied, 289 U. S. 739). The cases are collected and examined in Vold, *Are Threefold Damages Under the Anti-Trust Act Penal or Compensatory?*, 28 Ky. L. J. 117–159. See also *Right of the United States to Sue for Treble Damages*, 89 U. of Pa. L. Rev. 243–245, fn. 10.

lated constitutional guarantees when applied to a defendant who, in the utmost good faith, consistently maintained during the course of extended litigation that his particular business arrangement did not offend the statutory prohibitions.

The constitutional question is, we submit, foreclosed by *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U. S. 57, where a state statute making it unlawful to cut timber on state lands without a valid permit provided treble damages if the offense was willful and double damages if it was not. Upon finding that the defendant "had reasonable ground for believing authority had been granted and honestly acted on such belief," the State court awarded double damages. This Court rejected the contention that, as thus applied, the statute was invalid under the due process clause (pp. 68–69):

> * * * innocence cannot be asserted of an action which violates existing law, and ignorance of the law will not excuse. The law in controversy has no *ex post facto* element or effect in it. It was existing law when the trespass of plaintiffs in error was committed, and a trespass is a legal wrong, not an innocent act. There is no element of deception or surprise in the law. When the permit was issued plaintiffs in error knew the limitations of it, and they took it at the risk and consequences of transgression * * *.

The State courts and lower federal courts have almost uniformly held that the liquidated damages

provision of Section 16 (b) of the Fair Labor Standards Act is compensatory rather than penal in nature.[11] Since it is apparent that employees do suffer injury from failure by employers to comply with the modest standards imposed by the Act,[12] there would appear to be little justification for

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[11] One line of cases holds that the "double damages" do not constitute a penalty incurred under the laws of the United States within the meaning of Sections 24 (9) and 256 of the Judicial Code (28 U. S. C. secs. 41 (9) and 371). *Robertson* v. *Argus Hosiery Mills*, 121 F. (2d) 285, 286 (C. C. A. 6th), certiorari denied, No. 638, present term; *Stewart* v. *Hickman*, 36 F. Supp. 861 (W. D. Mo.); *Kuligowski* v. *Hart*, 4 Wage Hour Rept. 203 (N. D. Ohio); *Wingate* v. *General Auto Parts Co.*, 40 F. Supp. 364 (W. D. Mo.); *Barron* v. *F. H. E. Oil* Co., 4 Wage Hour Rept. 551 (W. D. Tex.); *Hart* v. *Gregory*, 218 N. C. 184, 10 S. E. (2d) 644; *Forsyth* v. *Central Foundry Co.*, 240 Ala. 277, 198 So. 706; *Graves* v. *Armstrong Creamery Co.*, 154 Kans. 365, 118 P. (2d) 613; *Emerson* v. *Mary Lincoln Candies*, 173 Misc. 531, affirmed 261 App. Div. 879, affirmed, 287 N. Y. 3[illegible] N. E. (2d) 234; *Abroe* v. *Lindsay Bros. Co.*, 300 N. W. 456 (S. Ct. Minn.); *Tapp* v. *Price-Bass Co.*, 147 S. W. (2d) 107 (S. Ct. Tenn.); *Duke* v. *Helena-Glendale Ferry Co.*, 5 Wage Hour Rept. 206 (S. Ct. Ark.); *Dennis* v. *Equitable Equipment Co.*, decided March 16, 1942 (Ct. App. La.); *Adair* v. *Traco Division*, 192 Ga. 59, 14 S. E. (2d) 466. The *Adair* case overruled *Anderson* v. *Meacham*, 62 Ga. App. 145, one of the two decisions upon which petition relies (Br. 43–44). The other line of cases holding Section 16 (b) to be remedial rather than penal involves determination of the applicable statute of limitations. *Collins* v. *Hancock*, 4 Wage Hour Rept. 522 (D. La. Caddo Parish); *Tucker* v. *Hitchcock*, No. 370, S. D. Fla., Oct. 2, 1941; *Klotz* v. *Ippolito*, 40 F. Supp. 422 (S. D. Texas).

[12] Compare the Congressional finding, in Section 2 (a), that there exist "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health efficiency, and general well-being of workers * * *."

going behind the deliberate designation of the additional amount as "liquidated damages" (see *Robertson* v. *Argus Hosiery Mills*, 121 F. (2d) 285, 286 (C. C. A. 6th), certiorari denied, No. 638, present Term) or for assuming that the employee's injury is fully compensated by mere repayment of the compensation earned but wrongfully withheld. Congress could find, as it did, that a remedy so restricted would be inadequate as well as late.

3. Moreover, even if the double damages provision be regarded as punitive rather than remedial, petitioner's objection on constitutional grounds is nevertheless not well taken. Criminal sanctions and fines so substantial as to nullify, in practical effect, the right to judicial review may be invalid.[13] But the test is one of degree and a penalty which violates constitutional guarantees is one "so extravagant in amount as to outrun the bounds of reason and result in sheer oppression." See *Life & Casualty Co.* v. *McCray*, 291 U. S. 566, 571. "Double damages" are plainly not in this category. *Missouri Pacific Ry. Co.* v. *Humes*, 115 U. S. 512; *Minneapolis & St. Louis Ry. Co.* v. *Beckwith*, 129 U. S. 26; *Kansas City Southern Ry. Co.* v. *Anderson*,

[13] See *Ex parte Young*, 209 U. S. 123 (penalty of $5,000 fine or up to five years in prison, or both, for charging railroad rates in excess of the statutory maximum); *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331 (penalty up to $500 per day for refusal to obey administrative order setting maximum laundering rates); *Natural Gas Co.* v. *Slattery*, 302 U. S. 300 (penalties of $500 to $2,000 per day for failure to comply with administrative order to produce records). But cf. *United States* v. *Clyde Steamship Co.*, 36 F. (2d) 691

233 U. S. 325. Cf. *Seaboard Air Line Ry.* v. *Seegers*, 207 U. S. 73; *Yazoo & Miss. Valley R. R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217. In striking down an award of $500 "liquidated damages" where the actual damage inflicted by an excess rate charge totalled $3.02, this Court said (*Missouri Pacific Ry. Co.* v. *Tucker*, 230 U. S. 340, 348):

> It will be perceived that this liability is not proportioned to the actual damages. It is not as if double or treble damages were allowed, as often is done, and as we think properly could have been done here * * *.

III

SECTION 7 APPLIED TO RESPONDENT DURING THE PERIOD COVERED BY THE JUDGMENT

Upon the same factual basis as it challenges the award of double damages under Section 16 (b) (*supra*, pp. 9–13), petitioner seeks to avoid all obligation to comply with Section 7 prior to determination by the Interstate Commerce Commission, on March 4, 1941, that the activities of rate clerks did not affect safety of operation (Br. 51–59). While petitioner invokes the "primary jurisdiction" doctrine (*Texas & Pacific Ry. Co.* v. *Abilene Oil Co.*, 204 U. S. 426) in contending that Section 7 did not become operative with respect to respondent until such a determination was made, it is plain

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(C. C. A. 2d), certiorari denied, 281 U. S. 744 (penalty of $500 a day for refusal to submit records for inspection by the Interstate Commerce Commission held valid).

that that doctrine is not involved here. The "primary jurisdiction" rule goes to the respective jurisdictions of the courts and the administrative agency; it is concerned with the question of which forum is appropriate procedurally and not with the curtailment or abridgement of substantive rights. See *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U. S. 285, 290. Although petitioner's motion to dismiss the complaint asserted a lack of jurisdiction in the District Court because the Commission had not yet made a determination with respect to rate clerks (see R. 12–15), such a determination was made prior to the joinder of issue (R. 15) and any question concerning the District Court's jurisdiction thereupon became moot, as petitioner concedes (Br. 53).[14]

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[14] Moreover, the "primary jurisdiction" doctrine relates to such questions as "complex transportation problems that must be solved as a prerequisite to a determination" of the legal rights and liabilities involved (*Armour & Co.* v. *Alton R. Co.*, 312 U. S. 195, 200); its applicability turns upon "the character of the controverted question and the nature of the enquiry necessary for its solution. * * * Preliminary resort to the Commission is required * * * because the enquiry is essentially one of fact and of discretion in technical matters * * *." *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291. The sole inquiry in the present case was whether the activities of a rate clerk affected safety of operations within the meaning of prior decisions of the Commission and the decision of this Court in *United States* v. *American Trucking Ass'ns*, 310 U. S. 534; that issue did not require preliminary application of an expert judgment (*supra*, pp. 12–13). See *Faulkner* v. *Little Rock Furniture Mfg. Co.*, 32 F. Supp. 590, 591 (E. D. Ark. 1940); *Magann* v. *Long's Baggage Transfer Co.*, 39 F. Supp. 742,

The clear import of petitioner's contention is that, as a matter of statutory construction, Section 7 did not become operative with respect to any employees of motor carriers until the Commission legislated them piecemeal into the scope of Section 7 by determining that their functions did not bring them within Section 204 of the Motor Carrier Act (Br. 54, 55). But Section 7 (d) expressly provides that the provisions of Section 7 "shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act" with respect to "any" employee "who is engaged in commerce or in the production of goods for commerce." Nor do any terms of the exemption stated in Section 13 (b) (1) support petitioner's view that Congress intended to suspend operation of Section 7 for an indeterminate period as to all employees of motor carriers, including those who are in fact not within the terms of the exemption. Section 13 (b) (1) refers only to employees with respect to whom the Commission has "power" to prescribe maximum hours; since the Motor Carrier Act provides

749–750 (W. D. Va.); *West* v. *Smoky Mountain Stages*, 40 F. Supp. 296, 296, 298 (N. D. Ga.); *Gavril* v. *Kraft Cheese Co.*, 4 Wage Hour Rept. 682, 683 (N. D. Ill.); *Thompson* v. *Daugherty*, 40 F. Supp. 279, 283 (D. Md.); *Neuwirth* v. *Kafer*, 176 Misc. 864 (City Ct. N. Y. 1941); *Gibson* v. *Glasgow*, 157 S. W. (2d) 814, 816–817 (Tenn. Sup. Ct., 1942); Note (1942) 55 Harvard L. Rev. 537–538. *Contra: Wonham* v. *Pennsylvania Greyhound Lines*, 4 Wage Hour Rept. 218 (E. D. Pa. 1941). The question is also discussed in the opinion of the District Court denying petitioner's motion to dismiss the complaint herein (R. 5–15).

no procedure for piecemeal delimitation of its power by the Commission, it does not appear that Congress contemplated different effective dates for various classes of employees, contrary to the express terms of Section 7. Indeed, since neither statute requires a determination by the Commission concerning the extent of its power, petitioner necessarily contends that certain employees might, by default on the part of the Commission, remain permanently outside the scope of Section 7.[15]

The cases cited by petitioner (Br. 56–57) hold merely that when an employee is in fact subject to the power of the Commission, the exemption granted by Section 13 (b) (1) applies whether or not the Commission has exercised its power by pre-

[15] Since there are no provisions requiring the Interstate Commerce Commission to assume jurisdiction, the situation here is to be contrasted with the analogous problem raised by the Railway Labor Act and Carriers Taxing Act which authorize the Mediation Board or the Commissioner of Internal Revenue or any interested party to invoke the jurisdiction of the Interstate Commerce Commission for the purpose of determining whether a particular carrier is a "street, interurban, or suburban electric railway" which is excepted from the operation of those statutes. See U. S. C., Title 45, Sec. 151; U. S. C., Title 26, Sec. 1532 (a). Moreover, petitioner errs in its unsupported assertion (Br. 54–55) that a determination by the Interstate Commerce Commission is essential prior to the effective operation of the Railway Labor Act and the Carriers Taxing Act with respect to carriers seeking exemption under the foregoing provisions. Administrative practice has been to the contrary, and, particularly in the case of the Carriers Taxing Act, the determination of the Interstate Commerce Commission is regarded merely as declaring the status that has existed theretofore.

scribing maximum hours.[16] The rationale of those decisions is that the application of Section 7 expressly turns upon the existence of the power. It is a necessary corollary that if the power is in fact absent, Section 7 applies as of the effective date therein stated.

In accordance with well-established principles, an exception to a remedial statute of general scope and embodying a broad legislative policy must be strictly construed; the burden is upon the one who seeks to take himself out of the sweep of the Act to demonstrate that he is within the granted exemption.[17] Doubtless, Congress contemplated that in the operation of Section 13 (b) (1) the power of the Interstate Commerce Commission over particular groups of employees would become a contested issue in proceedings under the Act. But what Congress could not have intended is that a litigant, having advanced his claim to exemption and the claim having been authoritatively rejected (here by both the Commission and the

[16] Believing that Congress did not intend that the hours of employees should be uncontrolled under either statute, the Administrator had expressed the opinion that the exemption did not become applicable, as to employees who were in fact subject to the power of the Commission, until the Commission had actually established maximum hours. Interpretative Bulletin No. 9, issued March 9, 1939. This position was abandoned in the fourth revision of the bulletin, March, 1942.

[17] *Bowie* v. *Gonzales*, 117 F. (2d) 11, 16 (C. C. A. 1); *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. (2d) 52, 56 (C. C. A. 8); *cf. United States* v. *Dickson*, 15 Pet. 141, 165.

courts), should nevertheless enjoy the exemption, to the detriment of those for whose benefit the statute was enacted.

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

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MARCH 1942.

APPENDIX

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060 (29 U. S. C., sec. 201, *et seq.*):

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this act.

* * * * *

SEC. 13 (b) (1). The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; * * *

* * * * *

SEC. 16. * * *

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

Motor Carrier Act, 1935, c. 498, 49 Stat. 543 (49 U. S. C., sec. 301, *et seq.*):

SEC. 204 (a). It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(2) To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uni-

form systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment * * *.

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